IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 30TH NOVEMBER 2007 / 9TH AGRAHAYANA 1929

SA.No. 857 of 1994()

AS.18/1992 of ADDL.SUB COURT, KOCHI
OS.61/1989 ON THE FILE OF THE COURT OF THE PRL. MUNSIFF OF KOCHI

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APPELLANTS: DEFENDANTS/RESPONDENTS:

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1. M.A.ALI, AGED 47 YEARS, S/O,HYDROSE, PUMP OPERATOR, K.S.R.T.C., ALWAYE, RESIDING AT H.NO.1/198, MATHER PARAMBIL, KAKKANAD KARA.
2. P.V.KURIACHAN, AGED 39, S/O.M.BASEEK, JUNIOR MECHANIC, K.S.R.T.C., ALWAYE, RESIDING AT 3/62, PARAKKADAVIL HOUSE, ELORR KARA.
3. K.M.KUNNUMOHAMMED, AGED 47, S/O. MOIDEEN, DRIVER, K.S.R.T.C. ALWAYE, RESIDING AT M.NO.VIII/8, KANJIRATHINKAL HOUSE, CHOORNIKKARA PANCHAYATH, THAYKKATTUKARA.
4. THOMAS CHERIAN, AGED 46S/O.CHERIAN, PUMP OPERATOR, K.S.R.T.C. ALWAYE RESIDING AT H.No.IX/74, OOROTH HOUSE, KIZHAKKAMBALAM PANCHAYAT.

BY ADV. SRI.M.M.MONAYE

RESPONDENT:PLAINTIFF/APPELLANT:

LITTLE FLOWER KURIES AND ENTERPRISES LTD., A COMPANY REGISTERED UNDER COMPANIES ACT, 1956, HAVING ITS REGISTERED OFFICE AT FORT COCHIN AND BRANCH AT BANGALORE.

BY ADV. SRI.VARGHESE C.KURIAKOSE
SRI.PRAVEEN K. JOY
SMT.THANKOM.G

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 30-11-2007 , THE COURT ON 30/11/2007 DELIVERED THE FOLLOWING:

C.M.P.No. 1891/1994 in S.A.No.857 /1994

Dismissed.

30-11-2007

Sd/-M.Sasidharan Nambiar,
Judge.

mn.

M.SASIDHARAN NAMBIAR,J.

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S.A. NO. 857 OF 1994

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Dated this the 30th day of November, 2007

JUDGMENT

Defendants in O.S.61/1989 on the file of Munsiff Court, Kochi are appellants. Plaintiff is the respondent. Respondent instituted the suit for realisation of Rs.12,650/- with interest being the amount due under a chitty transaction. Case of respondent is that respondent company started a kuri at Berampur branch from 11.11.1984 with a total sale of Rs.90,000/-. There were three classes viz, A, B and C with 60 tickets of Rs.250/-, 150/- and Rs.100/- respectively in each class and sale of Rs.15,000/-, Rs.9,000/- and Rs.6,000/- respectively. It was contended that Mrs.Omana Thomas had subscribed to one A class ticket and she bid the chitty on 11.9.1985 apart from the permanent discount of Rs.1500/- less Rs.4,500/- for Rs.9000/- and first appellant got assignment of entire rights of Omana Thomas in his favour and in

consideration of respondent Company paying the kuri amount to first appellant, all appellants entered into a contract with respondent Company agreeing to repay the kuri in accordance with the chitty agreement. As requested by appellants amount was paid to appellants at the head office of the respondent Company at Fort Kochi. They executed Ext.A4 receipt and also Ext.A2 demand promissory note agreeing to repay Rs.12,000/- in instalments. Ext.A2 was handed to the respondent Company along with Ext.A5 letter of guarantee by all appellants jointly. As per the terms of the agreement, appellants are liable to pay Rs.12,000/- at the rate of Rs.250/- per month from 11.11.1985 and in default have to pay interest at 12%. Appellants defauled to pay from 22nd instalment onwards. It was claimed that they are liable to pay Rs.12,650/- with interest at 12% which was claimed in the suit. Appellants resisted the suit contending that they have no connection with Mrs.Omana Thomas and first appellant did not get

assigned her rights as alleged and did not execute any document for that purpose in favour of respondent and therefore is not liable to pay any amount due under the chitty transaction. It was contended that in 1985 when first appellant was in urgent need of money, agent of the respondent Company approached him and agreed to arrange a loan and as required by the agent, first appellant along with other appellants went to the office of respondent Company and affixed their signatures in various documents as directed by respondent and first appellant received only Rs.4000/- and odd which he agreed to repay instalments at the rate of Rs.206/- per month and he regularly remitted the amount and paid Rs.2300/- and later realising that fraud is being played he stopped the payment and suit is filed without any bonafides.

2. Learned Munsiff on the evidence of PW1, DW1 and Exts.A1 to A15 found that appellants have denied any transaction with Mrs. Omana Thomas and Mrs.Omana Thomas was not examined and no evidence

was adduced to prove that first appellant purchased the rights of Mrs.Omana Thomas as claimed by respondent. It was also found that Ext.A5 was not proved and Ext.A8 shows that documents came into existence prior to 6.11.1985 and therefore case of respondent that appellants received Rs.12,000/- on 6.11.1985 cannot be believed. Learned Munsiff also found that when Ext.A8 shows that Rs.2500/- was paid by Mrs. Omana Thomas, it is not possible to believe that she assigned her right under the chitty for Rs.100/- as shown in Ext.A1. Learned Munsiff on the evidence found that Ext.A2 promissory note was not proved to be supported by consideration and suit was not filed within three yeas from 6.11.1985 and is barred by time. The suit was dismissed. Respondent challenged the judgment before Sub Court, Kochi in A.S.18/1992. Learned Sub Judge on reappreciation of evidence, set aside the findings of learned Munsiff and granted a decree in favour of respondent holding that first appellant got

assigned the rights of Mrs.Omana Thomas who was a subscriber to the chitty and thereafter executed Ext.A1 and A5 and Ext.A2. It was held that respondent is entitled to the decree. It is challenged in the second appeal.

3. Second appeal was admitted formulating the following substantial questions of law.

1. Whether the amount was given to first appellant on the basis of kuri transaction or loan transaction, since the amount was sanctioned on 30.10.1985 prior to the assignment of kuri dated 6.11.1985.

2. Whether the appellate court has applied the correct principles of law in deciding the liabilities of appellants.

3. Whether finding of the appellate court that Ext.A2 pronote is not barred by

limitation is correct since it is dated 6.11.1985.

4. Whether A1, assignment and A3 kuri karar are null and void being repugnant to the provisions of chit Funds Act, 1982.

4. Learned counsel appearing for appellant was heard.

5. The argument of the learned counsel is that first appellate court did not properly appreciate the evidence and without considering the reasons given by the trial court or finding that the reasons are not sustainable accepted the case of respondent which is not supported by any evidence and overlooking material evidence on record and therefore finding of first appellate court is not sustainable. It was argued that when Ext.A2 shows that it was executed on 6.11.1985, and that too on the basis of the assignment of the rights of Mrs.Omana Thomas who was a subscriber

of the chitty, first appellate court did not consider the findings of the trial court that Ext.A1 was not proved and when the subscriber had paid Rs.2500/- towards the chitty, it is not possible to believe that she would assign her rights for Rs.100/- and when Ext.A8 allegedly executed by appellants establish that the documents came into existence before Ext.A1 assignment of the rights by Mrs. Omana Thomas on 6.11.1985, case of the respondent should not have been believed.

6. What was contended by respondent was that Mr.Omana Thomas was a subscriber to A class chitty conducted by respondent. Admittedly chitty was not registered under Kerala Chitties Act. When respondent contended that Mrs. Omana Thomas bid the chitty on 6.11.1985 for Rs.9000/- and thereafter assigned her right under Ext.A1 in favour of first appellant, appellants have denied the case in toto. It was contended that they have nothing to do with Mrs.Omana Thomas and first appellant did not purchase the rights of Mrs.Omana

Thomas. Infact when PW1, the official of the Chitty Company was examined, even existence of Mrs.Omana Thomas was challenged. Whatever it be, when the trial court, which had occasion to note the demeanour of the witness did not rely on the evidence of PW1 and also the genuiness and correctness of the documents relied on by respondent, and the first appellate court is not agreeing with that findings, it is incumbent upon the first appellate court to analyse the evidence and give reasons for not accepting the findings of the trial court. Unfortunately first appellate court did not analyse the evidence or considered the reasons given by trial court for not accepting the case. Trial court for valid reasons found that Ext.A1 was not proved. Ext.A1 is seen executed by Mrs.Omana Thomas on 6.11.1985. None of the appellants are parties to the document. As per Ext.A1 Mrs.Omana Thomas had assigned her right in favour of first appellant on 6.11.1985. Ext.A8 shows that by that time Mrs.Omana Thomas had

already remitted Rs.2500/- to the respondent towards the chitty. Even according to respondent, she bid the chitty for Rs.9000/-. But as per Ext.A1 she assigned her right in favour of first appellant for Rs.100/-. It is highly improbable. When the suit is based on the trasanfer evidenced by Ext.A1 and it was disputed, burden is on the respondent to establish execution of Ext.A1. The only witness examined on the side of respondent is PW1. He deposed that he did not witness Mrs. Omana Thomas executing Ext.A1. Though it shows that she executed it in the presence of one Job who signed it as an attesting witness, he was also not examined. In such circumstance, Ext.A1 without proof should not have been relied on by the first appellate court. If so, there is no evidence to prove that rights of Mrs. Omana Thomas who allegedly subscribed to the chitty was purchased by first appellant. If that be so, it cuts the very root of the case set up by respondent.

7. Added to this, the trial court found that

as per Ext.A2 the promissory note was executed on 6.11.1985 and the evidence establish that it is not supported by consideration. If under Ext.A1 Mrs.Omana Thomas transferred her right in favour of first appellant only on 6.11.1985, there should not have been any possibility for filing an application by appellants earlier or respondent considering it. The trial court analysing Ext.A8 found that Ext.A8 application allegedly submitted by appellants a document printed by the respondent Company to be submitted by subscriber who bid the chitty for receiving the chitty amount shows that first appellant had signed the said document on 1.10.1985 more than one month prior to the assignment of the chitty under Ext.A1. It is seen from Ext.A8 that even the entry made at the office of the respondent company was on 10.10.1985 and it was sanctioned on 30-10-1985. If Ext.A1 is genuine, Ext.A8 could not be genuine. This aspect which was taken note of by the trial court was omitted to be appreciated by first appellate court.

8. The trial court on the evidence found that there is no evidence to prove consideration for Ext.A2 promissory note. Evidence do not establish that on the date of execution of Ext.A1, any amount was paid to first appellant. When the entire evidence is appreciated, as has been correctly done by trial court, it can only be held that first appellant was not a subscriber to the chitty or an assignee of the subscriber of the chitty. Therefore appellants are not liable to pay the amount due under the chitty transaction. First appellate court was not at all justified in reversing the findings of learned Munsiff or granting a decree in favour of respondent.

The appeal is therefore allowed. The judgment of Sub Court, Kochi in A.S.18/1992 set aside. O.S.61/1989 is dismissed. No cost.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A..NO.745 /1993

JUDGMENT

27th NOVEMBER,2007